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STATE OF INDIANA

DEC 11 2002

INDIANA UTILITY REGULATORY COMMISSION

INDIANA UTILITY
REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA)
BELL TELEPHONE COMPANY, INCORPORATED,)
D/B/A AMERITECH INDIANA PURSUANT TO)
I.C. 8-1-2-61 FOR A THREE-PHASE PROCESS)
FOR COMMISSION REVIEW OF VARIOUS)
SUBMISSIONS OF AMERITECH INDIANA TO)
SHOW COMPLIANCE WITH SECTION 271(C) OF)
THE TELECOMMUNICATIONS ACT OF 1996)

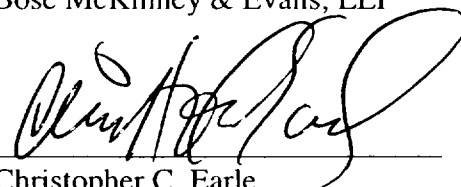
CAUSE NO. 41657

INITIAL COMMENTS OF FBN INDIANA, INC.
(ADDRESSING CHECKLIST ITEMS 1 AND 13)

Intervenor F.B.N. Indiana, Inc. ("FBN"), by counsel, submits the following Initial Comments in accordance with the Indiana Utility Regulatory Commission's Process Order in the above titled proceeding.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of December, 2002, a copy of the following was posted on the LISTSERV maintained in this proceeding in accordance with the agreement of the Parties and the Commission's process Order.



Christopher C. Earle

I. EXECUTIVE SUMMARY.

FBN provides the following for its comments as to whether and to what degree Ameritech Indiana has complied with the market opening mandates of the Federal Telecommunications Act of 1996 (“the Act”). Specifically, the Act requires Ameritech Indiana compliance with the 14 point checklist found in Section 271(c)(2)(B) of the Act as well as requirements that Ameritech Indiana’s entry into the long distance business will be in the public interest. Due to market entry delays caused by Ameritech Indiana’s recalcitrance in complying with the plain black and white requirements of its interconnection agreement with FBN, FBN has little or no experience with many of the items on the fourteen point checklist. In addition, FBN is not a multi-state carrier with experience in § 271 proceedings in other jurisdictions, but rather is an Indiana-based company attempting to successfully enter the market as a competitive provider of telecommunications on a more limited scale than that of large national carriers. Therefore, FBN will limit its comments herein to Checklist items 1 and 13, dealing with interconnection and reciprocal compensation, respectively.

Ameritech Indiana claims to offer all of the possible methods of interconnection on a non-discriminatory basis to all CLECs in the state. It lists the various affidavits, interconnection agreements, tariffs and schedules containing the terms and conditions supporting this claim in what it calls a cross-reference matrix. In further support of its compliance with Checklist Item One, Ameritech Indiana alleges that it has implemented binding terms and conditions for interconnection in its approved interconnection agreements.

FBN shows that even in the presence of so-called “binding” terms and conditions spelled out in the plain black and white of an interconnection agreement, Ameritech Indiana refuses to provide the interconnection facilities as required. Even having lost issues in the course of a Section 251 arbitration (in fact having lost some issues twice), Ameritech Indiana nonetheless proceeded as though it had won those issues and refused to implement interconnections consistent with Commission-approved interpretations . Thus, the fact that Ameritech Indiana has entered into interconnection agreements with CLECs in Indiana is not indicative of its compliance with Checklist Item 1 if it refuses to honor the plain black and white of those agreements. Ironically, FBN’s experience with Ameritech Indiana in the context of its interconnection agreement has occurred against the backdrop of this § 271 proceeding at a time when Ameritech Indiana should have the most incentive to present itself as cooperative.. One can only imagine how anti-competitively Ameritech Indiana might act if granted long distance authority in Indiana.

In FBN’s experience, Ameritech Indiana’s foot-dragging has not only significantly delayed FBN’s market entry for over fifteen months, it also appears that Ameritech Indiana’s position was motivated in no small part by a desire to avoid reciprocal compensation payments to FBN. Checklist Item Thirteen is thus implicated in the same manner as Checklist Item One – the terms and conditions contained in Commission-approved interconnection agreements with Ameritech Indiana are worthless if not honored. Ameritech retains sufficient monopoly market power to allow it to practice behavior that would be suicidal in a competitive market. . The only rational explanation for Ameritech Indiana’s behavior is that it understands fully its market power and it exerts that power to the detriment of its competitors in every manner.

If Ameritech Indiana cannot provide even a veneer of pro-competitive behavior when it has the regulatory incentives to do so, the Commission, the industry and the FCC can expect nothing but anti-competitive behavior if those incentives are removed. Thus, even if Ameritech Indiana could show that it meets every other checklist item, (which these comments demonstrate cannot happen) it could certainly not support this application as consistent with the public interest – it is not.

II. DISCUSSION.

A. **Ameritech Indiana has failed to open its network for interconnection to competitive local carriers as required by Section 271(c)(2)(B)(i).**

FBN has over one and one-half years of experience in working against Ameritech Indiana's willingness and ability to "slow-roll" the interconnection process. FBN adopted the vast majority of the Ameritech/AT&T interconnection agreement through §252(i).¹ Despite crystal clear language in the interconnection agreement supported by a lengthy arbitration record and numerous Commission Orders, Ameritech Indiana nevertheless delayed the implementation of FBN's requested interconnection in Crown Point, Indiana based upon interpretations of the agreement the Commission had previously rejected until FBN expended the resources to prosecute and win a Rocket Docket Order to implement the connection. Although that interconnection is not yet complete, Ameritech Indiana appears at long last to be implementing both phases of that interconnection on the timeline ordered by the Commission.² Despite the

¹ While FBN arbitrated three narrow issues with Ameritech Indiana, the remainder of its Agreement with Ameritech was adopted directly from the AT&T Agreement. See IURC Cause No. 42001 INT-01.

² IURC Cause Nos. 42001-INT-01-RD-01 and RD-02 (consolidated). On May 13, 2002, FBN filed its Complaint against Ameritech Indiana in Cause No. 42001-INT-01-RD-01 pursuant to the Commission's Expedited Procedure for Resolving Interconnection Disputes under 170 IAC §7-7-1, *et seq* seeking a final order requiring Ameritech to interconnect with FBN by mid-span interconnection in Palmer, Indiana, using existing unused facilities between Ameritech and FBN's affiliate, Northwestern Indiana Telephone Company, Inc. ("NITCO"). On July 19, 2002, FBN filed a second Complaint, docketed as 42001-INT-01-RD-02 (the "RD-02" Complaint). The RD-02 Complaint also sought a final order requiring Ameritech to interconnect with FBN using a mid-span interconnection in Palmer, Indiana, and also cited sections 3.2.2 and 3.2.3 of the Agreement, but the proposed interconnection was to employ

imminence of the interconnection in Crown Point, the interconnection nevertheless required FBN to expend considerable amounts of cash and resources in order to force Ameritech Indiana to provide what should have been, given the clear language of the interconnection agreement, a routine interconnection within days of the initial request.

Ameritech Indiana claims compliance with Checklist Item One as follows:

Ameritech Indiana satisfies checklist item 1 by making available all required forms of interconnection. Ameritech Indiana makes Fiber-Meet Interconnection available at any mutually agreeable, technically feasible point between a CLEC's premises and an Ameritech Indiana tandem or end office. *Deere Aff.* ¶ 15. The Fiber-Meet arrangement may be used to provide interoffice trunking for originating and terminating calls between the two networks or for transit of calls to or from a third party via Ameritech Indiana's tandem switch. *Id.* ¶ 16; *see also id.* ¶¶ 17-21 (discussing types of Fiber-Meet arrangements). CLECs can interconnect to Ameritech Indiana at the trunk-side or line-side of the local switch, trunk connection points of a tandem switch, central office cross-connect points, out-of-band signaling transfer points, and points of access to UNEs, as well as other technically feasible points upon request. *Id.* ¶¶ 23-24; 47 C.F.R. § 51.305(a)(2). At their discretion, CLECs can obtain a single point or multiple points of interconnection per LATA. *Deere Aff.* ¶ 32.³

Ameritech Indiana also claims that it has entered "binding" contracts that require it to provide interconnections of all types.⁴ FBN does not disagree that the clear language of these contracts should be binding on the parties, but the Commission should not simply accept the existence of such agreements as proof of compliance with Checklist Item 1. Ameritech Indiana not only forced FBN to seek Commission relief in two Rocket Docket complaint proceedings, but also to fight the same issues already decided against Ameritech twice in the arbitration that

new facilities and under a new architecture rather than existing facilities. The two complaints were subsequently consolidated by the Commission.

³ *Draft Brief in Support of Application by SBC Communications, Inc., Ameritech Indiana, and Ameritech Long Distance For Provision of In-Region, InterLATA Services in Indiana*, p. 9.

⁴ *Alarander Affidavit* pp. 10, 11

produced the interconnection agreement.⁵ Indeed, an individual from SBC's Network Regulatory Department responsible for oversight of the FBN interconnection flatly stated that Ameritech Indiana would not provide the requested interconnection unless the IURC ordered it in spite of the fact that the issue at hand had previously been explicitly decided against Ameritech Indiana by the Commission.⁶ Ameritech Indiana consistently demonstrated its ability to look at "white" and interpret it as "black." Such conduct is neither defensible nor consistent with the Act. The only reasons that can possibly support this behavior are anti-competitive in nature.

The RD-01 complaint resulted from an interconnection request first made in August, 2001. The Agreement between the parties calls for such interconnections to be completed within one hundred fifty (150) days.⁷ The interconnection was proposed over facilities already in place. The only requirements for turning up this interconnection were electronics and the provisioning of trunks within the Ameritech Indiana network. As of the date of this filing, that interconnection, though it appears to be imminent, is not yet in place. The total elapsed time is now 470 days.⁸

Section 251(c)(2) of the Act requires that interconnections be made available at any technically feasible point on Ameritech Indiana's network. It also requires that the interconnection be made on a non-discriminatory basis and that it be made available to CLECs in the same manner that it is made available to any other person. Not only does the law require this

⁵ *In Re Complaint of FBN Indiana, Inc.*, IURC Cause. 42001-INT-01-RD-01 and 42001-INT-01-RD-02. (consolidated), (Approved October 16, 2002)("IURC RD-01 and RD-02 Order"), pp. 15-16.

⁶ See FBN Exhibit 1, Tab A, IURC Cause No. 42001 INT-01-RD-01 and RD-02 (consolidated), at p. 26.

⁷ Interconnection Agreement between FBN and Ameritech Indiana Section 3.10.4

type of interconnection, but the Interconnection Agreement between FBN and Ameritech Indiana specifically reiterated these requirements. FBN's requested interconnection in RD-01 fit all of these criteria perfectly. Further, the interconnection was the least expensive alternative available to Ameritech.⁹

Ameritech opposed the RD-01 interconnection vigorously, aggressively and stridently, showing no intention whatsoever of fulfilling the contractual obligations imposed by the plain terms of the Commission-approved Agreement and implementing the interconnection. Ameritech Indiana ignored its obligations under the Agreement and forced FBN to choose between getting into business under unfavorable conditions with excessively high costs or suffering total loss of revenues and irreversible lost opportunities while incurring enormous legal and consulting costs to compel Ameritech Indiana's compliance.¹⁰ Each interconnection sought by FBN fully comported with the language of the Sections 3.2.2 and 3.2.3 of the Interconnection Agreement. The RD-01 interconnection is not only technically feasible, it currently exists and existed at the time of the original request to Ameritech from FBN. In fact, it exists on the same fiber facility for an interconnection Ameritech has extended to an "other person" within the meaning of the Agreement and that the requested interconnection is located at the same interconnection point and requested at the same OC-12 transmission rate provided in the existing connection to NITCO, also within the meaning of the Agreement binding the parties as well as the language of Section 251(c)(2) of the Act.¹¹

⁸ Affidavit of Dennis L. Ricca ("Ricca Affidavit"), p. 2.

⁹ Ricca Affidavit, p. 1.

¹⁰ Affidavit of Mark Taylor ("Taylor Affidavit"), pp. 2 and 3.

¹¹ IIRF RD-01 and RD-02 Order pp. 11-15

Ameritech refused to negotiate in good faith in both RD-01 and RD-02 by disregarding its obligations in Article III of the Agreement, raising objections to the interconnections that had no basis in or were contrary to the Agreement, and seeking to impose unilateral pre-conditions to further the negotiations contrary to the express language of the Agreement. At every step of the process involved in the negotiations of these two interconnections, Ameritech Indiana Ameritech, instead of looking for solutions, erected roadblocks that caused unnecessary and harmful delay.¹²

Ameritech Indiana demonstrated continued bad faith in dealing with FBN from the very start of negotiations through the hearing itself. Ameritech injected cost as an issue by attempting to force FBN to accede to its demands to pay for interconnection trunking or DEOT transport that the Agreement imposes only on Ameritech. Ameritech Indiana's testimony repeatedly raised issues lost by Ameritech in the *AT&T Arbitration*, which produced the language of FBN's Interconnection Agreement upon which the RD-01 and RD-02 complaints were based.¹³ Ameritech Indiana's cost estimate of \$328,700 for RD-01 was overstated by some \$306,700.¹⁴ Ameritech attempted to invoke Agreement language requiring mutual agreement of the parties. The Commission had rejected Ameritech's efforts to insert such language into Sections 3.2.2 during the *AT&T Arbitration*.¹⁵ Further, the Commission ruled that Ameritech's position in this proceeding would render meaningless the "at-its-option" language of Sections 3.2.2 and 3.2.3.¹⁶ Ameritech's assertion that the Agreement does not contemplate one-way traffic was not only lost

¹² *Taylor Affidavit*, p 3.

¹³ *Id.*, p. 2 of 4.

¹⁴ IURC RD-01 and RD-02 Order, pp. 11-12.

¹⁵ IURC RD-01 and RD-02 Order, pp. 15-16.

¹⁶ *Id.*, pp. 13-15.

in the *AT&T Arbitration*, but rather the opposite is specifically required by the interconnection Agreement in Sections 3.1 and 4.3.1

The interconnection agreement between the parties and earlier Commission rulings make clear that this argument is meritless.¹⁷

Ameritech Indiana's witness was less than truthful in alleging that the FBN proposals were technically infeasible, inordinately expensive and outside the realm of what other CLECs have ever requested or obtained.¹⁸

B. Ameritech Indiana Has Failed to Open its Local Markets to Competition in Order to Protect Itself from Paying Reciprocal Compensation to FBN.

As shown above, Ameritech Indiana failed to open its network to allow interconnection despite clear contract language requiring just exactly the interconnection sought by FBN. During the course of the hearings, another reason for Ameritech Indiana's foot-dragging became apparent – Ameritech Indiana's desire to not make reciprocal compensation payments to FBN. Ameritech Indiana was unapologetic in raising and stating this issue. Instead, Ameritech Indiana-Ameritech's witness testified as follows:

The reality is that the proposed use of the architecture that FBN is requesting is outside of the intent of the Agreement, dictates that Ameritech Indiana pay for a disproportionate amount of the interconnection facilities, is not in parity with CLEC interconnection in the State of Indiana today, and allows no hope of compensation to Ameritech Indiana through reciprocal compensation as provided for in the Agreement.¹⁹

Thus, even though the reciprocal compensation is specified in a "binding" interconnection agreement, Ameritech Indiana continues to have no qualms about employing

¹⁷ *Id.*, p. 12.

¹⁸ IURC RD-01 and RD-02 Order, pp. 11-12.

¹⁹ Cause No. 42001-INT-01-RD-01 and 42001-INT-01-RD-02, consolidated, *Responsive Testimony of Mark Novack*, Q&A 17. Ameritech Indiana's witness Novack continues at Q&A 18 to voice concern that Ameritech Indiana will receive no reciprocal compensation under the initial interconnection proposed by FBN.

whatever tactics necessary in order to delay payment of fair and reasonable compensation to FBN according to the terms of its Commission-approved interconnection agreement. It has so far escaped paying any amount of reciprocal compensation to FBN for 320 days.²⁰ Here, as with the Checklist Item One interconnection requirements, FBN can take no comfort that the issue is guaranteed in “binding” contractual language. Ameritech Indiana ignores the express language and continues to use its market power to hinder competition in its local markets. Such behavior does not warrant the reward of market entry into the competitive long distance market.

III. Conclusion.

The Commission found in FBN’s favor on every substantive issue in both the RD-01 and RD-02 complaints. Only now does Ameritech proceed with the implementation of these interconnections so clearly delineated within the Ameritech Indiana-FBN interconnection agreement and found in the Telecommunications Act of 1996 itself. The implications are clear here – Ameritech Indiana cannot be trusted to honor even contractually “binding” commitments to open its network. Ameritech Indiana shamelessly calls “up” “down” and “black” “white” in regulatory proceedings rather than admit that up is up and black is black by honoring interconnections pursuant to the clear black and white of its interconnection agreements. If Ameritech Indiana cannot be trusted to give even an appearance of honoring its contracts while it awaits long distance authority, there is no hope that this Commission can expect it to honor its commitments after the grant of § 271 authority. For all of the above reasons, the Commission should conclude that Ameritech Indiana has failed to comply with Checklist Items 1 and 13, and accordingly reject its request for a positive recommendation to the FCC for Ameritech Indiana’s entry into the long distance market. Such a recommendation cannot be in the public interest unless and until Ameritech Indiana can

²⁰ *Кисса Агжаавир*, p. 4.

demonstrate that it has irreversibly opened its local markets to competition. Until it can no longer impose its market-constraining behavior on the local exchange markets it serves, however, it should be denied such approval.